



MINUTES
FRIDAY – JULY 26, 2002

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:10 a.m., on Friday, July 26, 2002, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, Susan Kirby Brooke, David Fishbaugh, Garon Smith (via teleconference), Ward Shanahan, Kim Lacey (9:40 a.m. arrival), and Russ Hudson

Board Members Absent: None

Board Attorneys Present: Tom Bowe and Kelly O'Sullivan, Attorney Generals Office, Department of Justice

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Carol Hendrickson, Hendrickson's Court Reporting

Department Personnel Present: Jan Sensibaugh, Director; John North, Chief Legal Counsel, Legal Unit (Legal), Director's Office (DIR); David Rusoff, Legal, DIR; Keith Christie, Legal, DIR; John Arrigo, Administrator, Enforcement Division (ED); Art Compton, Administrator, Planning, Prevention and Assistance Division (PPAD); Ann Danzer, Administrator, Centralized Services Division (CSD); Dave Klemp, Air Quality Permitting Program Manager, Air & Waste Management Bureau (AWMB), Permitting & Compliance Division (PCD); Charles Homer, Technical Support Section Manager, AWMB, PCD; Debra Wolfe, Resource Protection Bureau (RP), PPAD; Ed Hayes, Legal, DIR; Tom Ring, Environmental Management Bureau (EMB), PCD; Tom Ellerhoff, Administrative Officer, DIR; Abe Horpestad, RP, PPAD; Claudia Massman, Legal, DIR; Jim Madden, Legal, DIR; Bob Jeffrey, AWMB, PCD; Christian Levine, RP, PPAD; Mike Suplee, RP, PPAD; Jan Brown, AWMB, PCD; Lisa Peterson, Public Affairs Coordinator, DIR; Dan Walsh, AWMB, PCD; Debbie Skibicki, AWMB, PCD; Warren McCullough, EMB, PCD; Jolyn Eggart, Legal, DIR; Judy Hanson, PCD; Bob Bukantis, MD, PPAD

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): George MacMillan, United Harvest; Bruce Williams, Fidelity E&P; Matt Clifford, Clark Fork Coalition; Jennifer McKee, Lee Newspapers; Steve Wright, CFAC; Don Allen, WETA; *unknown*, GSJW; Julie DalSoglio, US EPA; Terry McLaughlin, Stone Container; Angela Janacaro, Montana Mining Association; Mike Murphy, Montana Water Res. Association; Terry Webster, Continental Energy; Chuck Hansberry, Holland & Hart; J.D. Oster, MT DEQ; Janis Ho How [sic], NPRC; Jim Carlson, Missoula City-County Health; *unknown* Toole, CWVMT [sic]; Patricia Helney [sic]; *unknown*, GSJW; James Jensen [sic], MEIC; Tom Schneider; Mary Beth Marks, USDA Forest Service; Michael *unknown*, NPRC; Mark Fix, NPRC; Roger Muggli, T&Y Irrigators; Ray Muggli, Tongue River Irrigator; Amy Frykman [sic], Northern Plains; Wally McRae, Rocker 6 Ranch [sic]; Art Hayes, Jr., TRWU; Larry Munn, Tongue River Irrigators; Charles Gephart, T&Y Irrigation District; Rex Mongold, Tongue River Farm; Brenda Lindlief Hall, Tongue River Water User's Association; David Schwarz [sic], Buffalo Rapids Project; Steve Gilbert, NPRC CBM Task Force; Bill Griffin, Powder River Irrigator; Dave Searle, Marathon Oil Company; Donna Hupp [sic], Fidelity; Harmon Ranney, MCBNGA; Gail Abercrombie, Montana Petroleum Association; Gary Beach, WY DEQ; Mike Whittington, Beartooth Alliance; Mike Holzwarth [sic], PPL Montana CSES; Lewis Schoenberger, Conoco; George Harper; Dorothy Harper; Mary Wiper, Sierra Club; Kathryn Hohman [sic], Sierra Club; Nancy Harper McNeilly; Michael Courier [sic], Maxim

I. Administrative Items

A. Review and Approve Minutes of June 7, 2002, Meeting.

Dr. Garon Smith identified that “counsel” was again inaccurately spelled “council”, as had been pointed out in the March 29 minutes.

Chairman Joe Russell requested the term “tardy” not be used in future minutes to reflect Ms. Kim Lacey’s late arrival caused by her flight.

Chairman Russell informed the Board there were problems with Ms. Lacey’s flight and she would be arriving about 10:30. He further explained Ms. Lacey did not want the Board to address any coalbed methane (CBM) issues until she was present.

Mr. Russ Hudson MOVED to ACCEPT the minutes with the corrections noted. Mr. Ward Shanahan SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

II. Briefing Items

A. Contested Case Update

1. Cases Assigned to Hearing Officer Kelly O’Sullivan

a. Town of Geraldine

Ms. Kelly O’Sullivan, Board Attorney, stated the status of this case had not changed since the last meeting. She further stated the parties were awaiting the decision of the water use classification rules, which would be presented to the Board at this meeting. Ms. O’Sullivan informed the Board that she had scheduled another status conference for September 12 and that the case had been continued to December 31.

b. Missoula County

Ms. O’Sullivan informed the Board that the parties in this case had settled and the matter would be presented to the Board as a final action item.

2. Cases Assigned to Hearing Officer Tom Bowe

a. Louisiana-Pacific Corporation

Mr. Tom Bowe, Board Attorney, informed the Board that later on the agenda was an item to approve the settlement in the case and additional information was included in the green folders.

b. M & W Investments, Inc.

Mr. Bowe informed the Board this case was one of several subdivision cases, a schedule had been issued, and there was nothing to add to what was listed on the agenda.

c. M & W Investments, Inc.

Mr. Bowe explained to the Board that a proposed decision for dismissal of the case would be presented to the Board as an action item. He further informed the Board that the parties did not file exceptions to the proposed decision.

d. Sterling Mining Company

Mr. Bowe provided an update in this case, stating the parties had filed a motion and on July 16 the parties stipulated to dismissal of the claims based on the state constitution. He also explained that a hearing on motions for other pending claims was set for August 9.

e. Wendy R. Schultz

Mr. Bowe informed the Board the parties had agreed on a stipulation, which will be presented to the Board later in the agenda.

f. Westmoreland Resources, Inc.

Mr. Bowe reported that a hearing was set for December.

g. Vicky A. Randolph

Mr. Bowe stated that a hearing was set for August 28.

3. Cases in Litigation

a. United Harvest

Mr. Bowe explained he had nothing to add to what's already listed in the agenda.

b. Montana Sulphur and Chemical Company

Mr. Bowe clarified that DEQ and the Board are not parties in this litigation and that there's nothing for the Board to do at this time.

B. Review of Agency Fees

Ms. Ann Danzer, representing DEQ, dispensed a revised copy of the financial report to the Board and explained its format. Ms. Danzer provided a descriptive review of the air quality fees and stated that a hearing was being held Tuesday on those fees. She further informed the Board that a fee request would be presented to the Board in September.

Ms. Danzer spoke about the solid waste fees and explained that a fee request would probably be presented to the Board in early spring. She further proposed providing another financial report to the Board in September.

Discussion commenced between Chairman Russell and Director Jan Sensibaugh regarding water quality discharge permit fees. Ms. Sensibaugh clarified why some fees were reviewed and presented to the Board annually and why others were not.

Mr. Hudson suggested a financial report, such as the one presented, be provided to the Board on an annual basis. Director Sensibaugh concurred and advised that it would be done at the September meetings since that is when everything closes for the year before.

C. Battelle's Monitoring Report for the 12d Stipulation for the Colstrip Generating Plant

Mr. Tom Ring, on behalf of DEQ, provided history on the matter. He gave further information about the monitoring over the last couple of years and informed the Board that DEQ concurred with the conclusions in the report. Mr. Ring concluded by stating that, because of known seepage problems, the area will continue to be watched carefully.

Discussion commenced between Mr. Ring and Chairman Russell regarding the effluent holding pond.

III. Action Items

A. Initiation of Rulemaking and Amendments, and Appointment of Hearings Officer

1. In the matter of the amendment of ARM 17.24.101 and other rules pertaining to the Metal Mine Reclamation Act.

Mr. Warren McCullough, on behalf of DEQ, explained that the purpose of this rulemaking was to conform to revisions made in the Metal Mine Reclamation Act by the 2001 Legislature. Mr. McCullough pointed out some date corrections that needed to be made, then offered detailed information on the specific changes being requested. He further informed the Board that prior to bringing this before the Board, DEQ had consulted with the Montana Mining Association, WETA, and MEIC and had tried to incorporate some of their suggested changes.

Discussion commenced regarding the difficulty in obtaining mining bonding, and Chairman Russell identified a misspelling.

Mr. Shanahan MOVED to INITIATE the rulemaking and to APPOINT Ms. O'Sullivan as the hearings officer. Ms. Susan Kirby-Brooke SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

In regard to Agenda Items III.A.2&3 – The Board postponed these matters until Ms. Lacey's arrival.

4. In the matter of the adoption, amendment, and repeal of rules pertaining to the issuance of Montana air quality permits.

Mr. Charles Homer, representing DEQ, offered background on the rule request. He detailed three main areas of change in the notice. He handed out documents to the Board that showed the language that would be deleted in the final notice if the Board chose to take the action of not considering past compliance history in issuing permits.

Mr. Homer informed the Board that a hearing was scheduled for October 10. Mr. Bowe stated he would be available to preside over the hearing. Dr. Smith pointed out a formatting problem.

Mr. David Fishbaugh MOVED to INITIATE the rulemaking and to APPOINT Mr. Bowe as hearings officer with the established dates and noted corrections. Mr. Hudson SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

5. In the matter of the amendment of ARM 17.8.1101, 1102, 1103 and 1107, the adoption of new rules I through III, and the repeal of ARM 17.8.221 pertaining to the protection of visibility in mandatory federal Class I areas.

Ms. Debra Wolfe, on behalf of DEQ, provided background on the visibility rules, specifically how in 1977 Congress amended the Clean Air Act and established the protection of visibility in mandatory Class I areas. She explained that Congress then directed EPA to promulgate rules that would assure reasonable progress by the states toward achieving the national visibility goal, and EPA then promulgated seven visibility rules. Ms. Wolfe revealed that the Board had previously adopted rules that fulfilled the requirements for two of EPA's rules, but that in 1987 EPA disapproved our State Implementation Plan for failure to comply with the other five provisions of the federal regulations.

Ms. Wolfe offered reasoning for these rules still being undone, and then gave step-by-step details of the proposed new rules.

Mr. Shanahan MOVED to INITIATE the rulemaking and to APPOINT Mr. Bowe as the hearings officer. Ms. Brooke SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

6. In the matter of the amendment of ARM 17.8, Subchapter 6, pertaining to certain air quality open burning permits.

Mr. Homer, on behalf of DEQ, provided background on this rulemaking request. He explained the differences between the current rules and the changes proposed. Mr. Homer stated that the intent of the changes was to allow flexibility in approving open burning requests that could be accomplished outside the normal burning seasons and that would not adversely affect air quality. He further stated that the proposed amendments would make the air quality rules consistent with state and federal solid waste rules that regulate such burning.

Mr. Homer explained that the proposed amendments would increase the time the permits were valid and require DEQ inspection of the burn piles prior to burning to determine if they contain prohibited materials.

On behalf of DEQ, Mr. Homer concluded by recommending the Board initiate rulemaking, appoint a hearings officer, and conduct a hearing.

Discussion commenced regarding whether any counties commented, the purpose of changing a rule to make it conform to what is already being done, and the volume limits for major and minor open burning.

Ms. Brooke MOVED to INITIATE the rulemaking, APPOINT Ms. O'Sullivan as hearings officer, and to conduct a hearing on September 18. Mr. Shanahan SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

7. In the matter of the amendment of ARM 17.8.302(1)(f) pertaining to air quality incorporation by reference rules.

Mr. Homer explained that DEQ is requesting the Board consider revisions to DEQ's MACT rules, which are incorporated by reference, to adopt a federal rule verbatim. He stated that the proposed amendments would adopt and incorporate by reference revisions to the NESHAP General Provisions in Subpart A. Mr. Homer further explained that the general provisions consolidate all generally applicable information in one location and that the amendments make the general provisions more flexible.

Mr. Homer supplied further details of the amendments and concluded with DEQ's recommendation for the Board to initiate rulemaking, appoint a hearings officer, and hold a hearing.

Mr. Shanahan MOVED to INITIATE the rulemaking, APPOINT Ms. O'Sullivan as hearings officer and conduct a hearing on September 17. Mr. Fishbaugh SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

In regard to Agenda Items III.B.1-3 – The Board postponed these matters until Ms. Lacey's arrival.

C. Final Action on Appeals

1. Louisiana-Pacific Corporation (LP)

Mr. Chuck Hansberry, attorney representing LP, informed the Board that the parties had reached resolution of the appeal. He explained the issues of the settlement and what LP had agreed to do.

Chairman Russell read the order aloud. Mr. Hudson MOVED to direct Chairman Russell to SIGN the order. Mr. Shanahan SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

2. M & W Investments, Inc.

Mr. Bowe explained that the case was not considered a proper contested case and he had issued a proposed decision with an opportunity for the parties to file exceptions. He stated that neither party filed exceptions; therefore, it seemed appropriate for the order to be approved to dismiss the contested case without prejudice because the matter was brought prematurely by M & W.

Mr. Shanahan MOVED to APPROVE the recommendation and to direct the Chair to SIGN the order. Mr. Hudson SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

3. Wendy R. Schultz

Mr. Bowe informed the Board that the parties have entered into a stipulation to resolve the matter. He said his recommendation was for the Board to adopt the stipulation and a proposed order for dismissal, which would terminate the contested case.

Mr. Shanahan MOVED to ACCEPT Mr. Bowe's recommendation and to direct the Chair to SIGN the order. Ms. Brooke SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

4. Missoula County

Ms. O'Sullivan informed the Board that the parties had agreed to settle the case on the basis that DEQ withdrew its notice of violation and the County withdrew its request for appeal. She recommended the Board dismiss the case with prejudice.

Mr. Shanahan MOVED to ACCEPT Ms. O'Sullivan's recommendation and to direct the Chair to SIGN the order. Ms. Brooke SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

The Board now backed up to the skipped agenda items.

A. Initiation of Rulemaking and Amendments, and Appointment of Hearing Officer

2. In the matter of DEQ's request to initiate rulemaking for numeric water quality standards for the Tongue River and Powder River, Little Powder River, Rosebud Creek and their tributaries for Electrical Conductivity (EC) and Sodium Adsorption Ratio (SAR).

Chairman Russell explained that there were actually two items on the agenda addressing numeric standards; therefore, the Board would postpone a decision on DEQ's request until the next item had been addressed.

Mr. Art Compton, representing DEQ, reminded the Board they had asked for an allocation option in addition to the DEQ's proposal. He stated that DEQ recommends initiation of rulemaking on one or more of the alternatives before them. He reminded Chairman Russell of discussions held in past Board meetings and the recent correspondence between himself and the Governor regarding the idea of an interstate working group to ensure Wyoming is plugged into this process. He also reminded the Board of the Memorandum of Cooperation between Montana and Wyoming on this matter. Mr. Compton advised that DEQ prefers the combination of water quality technical people and environmental managers to the notion of an appointed commission or working group.

Mr. Compton pointed out that he spoke with some of the irrigators, or petitioners of the third alternative, who indicated they would be willing to work with industry to identify what, if any, middle ground could be reached. He further advised that the irrigators would like to do this within the confines of the rulemaking process.

Mr. Compton identified Dr. Jim Oster as being chosen and retained by DEQ to provide objective and technically based, independent peer review. He provided details of Dr. Oster's background and qualifications.

Mr. Compton identified a few typos in DEQ's rule requests and pointed them out to the Board for correction. Discussion commenced on the typos and the actual numbers within the rule requests.

Dr. Smith questioned the use of the term "total dissolved solids." He believed it should read "total dissolved salts." Dr. Oster addressed the issue and concurred with Dr. Smith.

Dr. Smith discussed concerns about the definition of milliequivalents and discussion commenced. Again, Dr. Oster addressed the issue by suggesting additional language in brackets.

Dr. Smith brought up concerns as to the possibility of needing to revisit narrative standards in other stages of the permitting process. He also questioned control at the border with the alternative that sets the level at the mouth of the rivers. Mr. Compton addressed both concerns.

Discussion commenced regarding the proposed standard of 500 decicemens in the tributaries. Mr. Compton provided information on the subject, and led into discussion about leaching fraction.

Mr. Shanahan requested clarity as to the difference(s) between DEQ's Alternatives 1 and 2. Mr. Compton referenced a table that was to have been included in the Board packet. The BLM EIS was also discussed. Mr. Compton stated that DEQ was working with EPA and Wyoming, the first meeting being the coming Monday. Also discussed was the TMDL process in relation to allocation and whether or not sources would be grandfathered in.

Mr. Gary Beach, Wyoming DEQ Water Quality Division Administrator, spoke of the shared interest Wyoming DEQ has with Montana on the issue at hand. He explained Wyoming's current narrative standards. He spoke of discussions held in regard to changing to numeric standards and of a work group that was formed to do an evaluation to that end. Mr. Beach told the Board that while the work group did make some recommendations for adjustments on the implementation of the narrative standards, the majority of the group recommended keeping the narrative standards.

Mr. Beach continued further discussion on Wyoming's narrative standards: how they're applied, how they are monitored for compliance, and recourse for noncompliance. He also answered questions from the Board regarding impacts to crops. Mr. Beach explained that what Wyoming calls "effluent limits" in their permits, is essentially the same as setting site-specific numeric standards for a specific drainage.

In light of his approaching teleconference departure, Dr. Smith made his preference known on the rulemaking issues at hand. He stated he preferred inclusion of Alternatives 1, 2, and 3 in the notice, so that the Board could hear all the different possibilities debated.

3. "Petition for Rule-Making to Set Numeric Water Quality Standards for Electrical Conductivity and Sodium Adsorption Ratio" from T&Y Irrigation Company, Tongue River Water Users Association, Buffalo Rapids Irrigation Project, and Northern Plains Resource Council.

Mr. Mark Fix, representing the petitioners, stated that they would like to request the Board initiate rulemaking on all three alternatives. He further said they believed it would be a wise decision for the Board to maintain their options. Mr. Fix added that the petitioners would like the Board to hold a hearing in Miles City.

Mr. Fix was asked to clarify the difference between the petitioners' fixed standards and DEQ's variable standards, and why one is more preferable than the other. Mr. Fix stated the variable standards seem more difficult for enforcement people to look at.

Dr. Larry Munn, technical support for the Tongue River Irrigators, stated he thought numeric standards on the streams was the way to go, since it allowed for dealing with the problem before it shows up on the producers fields. He provided further comment on narrative standards and brief comment on TMDL issues.

Mr. Art Hayes, Jr., representing Tongue River Water Users Association, stated that the association would like to see all three alternatives put out for public comment. He further stated they would like to see the Board go to Miles City.

Mr. Harmon Ranney, representing the Montana Coalbed Natural Gas Alliance, stated they would address both items III.A.2 and III.A.3, and requested to reserve the right to rebut any of the opposition's testimony. He further requested that the Board not only consider the three proposals before them, but to also consider a fourth proposal being the current narrative standards used in Montana.

Mr. Ron Waterman, on behalf of Fidelity Exploration, declared that Fidelity was opposed to the rule proposals before the Board. He further suggested Fidelity's support of an interstate commission. Mr. Waterman pointed out some problems they have with setting numeric standards. He further suggested that all parties involved work together collaboratively to develop a set of proposals that all could bring to the Board.

Mr. Bill Schafer, representing Fidelity Exploration, made three points in opposition of the three proposals before the Board. He suggested the rules were not well supported by science, that the rules as proposed retain little, if any, assimilative capacity in any of the rivers, and that there are several unintended consequences that would be brought about by the specific proposed rules. Mr. Schafer provided in-depth discussion and a poster board presentation to back up his points of opposition.

Mr. Schafer concluded by stating that he thought a more appropriate process as opposed to initiation of rulemaking at this point, would be to allow the interstate commission to engage in a collaborative process involving each of the affected stakeholders to create fair and appropriate standards that are protective of the resource.

Mr. Bruce Williams, representing Fidelity Exploration, provided specific information detailing Fidelity's production. He advised the Board that Fidelity's current permit is not limited by EC and SAR, but rather by nondeg consideration of ammonia, and that DEQ didn't get to the point of considering EC and SAR. Because of this, he could not understand the sense of urgency before the Board relative to the adoption of numeric standards for EC and SAR. Mr. Williams spoke in favor of a collaborative effort, involving all affected parties.

On behalf of Marathon Oil Company, Mr. David Searle stated that as a group, he felt that a fairly inadequate debate on the issue at hand had been provided. He spoke regarding his views of a good regulatory system. Mr. Searle stated it should be flexible and adaptable to land owners, cost-effective to industry, and have some sense of certainty.

Mr. Searle concluded with three recommendations to the Board: 1) to deny the rulemaking petitions before them; 2) defer action on the rulemaking until the next Board meeting and require all parties to get together and determine areas of agreement; and 3) form the interstate commission previously suggested.

Ms. Karen Rogge, Powder River Basin rancher and representative of Montana Coalbed Natural Gas Alliance, addressed the Board. On behalf of the Powder River County Commissioners, she requested the Board reject the proposals for adoption of numeric standards. For herself, personally, she discouraged adoption of numeric standards and urged the Board to reject the petitions.

Mr. Rick Rice, Broadus area rancher and contractor, expressed his opposition to adopting numeric standards. He pointed out the possible difficulty in working with Wyoming's narrative standards if Montana adopts numeric standards. Mr. Rice also cited economic reasons for not adopting numeric standards that might discourage industry in Montana.

Ms. Gail Abercrombie, representing the Montana Petroleum Association, suggested that the Board postpone acting on the rulemaking until September and charge DEQ with putting together a collaborative group of stakeholders to come forward with one rule for numeric standards and one rule for narrative standards with parts about applying numeric standards to the narrative standards.

Discussion commenced regarding violations in Wyoming. Dr. Munn confirmed there was litigation in Wyoming alleging crop damage caused by coalbed methane water. Further discussion was held regarding the specifics of Fidelity's permit. Mr. Horpestad confirmed that the permit was for a volume of discharge water, not for a number of wells.

Mr. Charlie Gephart, representing the T & Y Irrigation District, testified that the group was performing a soil survey on the soils being irrigated on the T&Y and that half the sampling was completed. He stated that there is drainage to those soils, that a few have a high content of clay and there are salt accumulations in them. Mr. Gephart advised the Board that this information was used to create the third petition submitted by NPRC and others.

Mr. Rex Mongold spoke about Decker discharging their coal mine water into the river and suggested that coalmine water is essentially the same as CBM water. He stated his belief that the containment ponds are leaking in Wyoming. Mr. Mongold further suggested that neither Wyoming's monitoring system nor narrative system are working.

Mr. Wally McRae, representing the Rocker 6 Cattle Company, expressed concern that narrative standards might not work with sub-irrigation. He urged the Board to look at all three rulemaking proposals and encourage public comment on them, and further cautioned the Board on delaying the process through formation of an interstate commission.

Mr. Roger Muggli, T & Y Irrigation, spoke in opposition of narrative standards stating they were not currently working. He urged the Board to move forward with all three petitions before them.

Discussion commenced regarding the possibility of reinjecting the CBM water. Mr. Searle explained that Marathon Oil had tried this approach, with little success. He informed the Board that they still use this method, but on site-specific cases.

Mr. Bowe pointed out some technical issues with the NPRC petition, including having the Board direct DEQ to do various things. Mr. Bowe questioned the legal authority for the Board to issue a rule on such subject matter. Ms. Claudia Massman, DEQ Attorney, advised the Board that while they may have the authority to direct DEQ to do some of those things, she thought the Board did not have authority to adopt a rule with subject matter.

Mr. Searle, on behalf of the petitioners, agreed to strike items 3, 4, 5, and 6 from their document.

Mr. Bowe referenced Administrative Rules of Montana 1.2.519, concerning the format of the petition. He stated that the rule requires a specific format for proposed rules and that the petition would need to be rewritten in the proper format.

Mr. Shanahan MOVED to: 1) have the Montana DEQ, the Wyoming DEQ, the gas producers, and the affected parties proceed to resolve their differences within the next 90 days and report to the Board their proposed solutions and remaining differences by October 28, 2002; 2) to start the rulemaking process by publication of notice with a request for public comment on three alternatives, being DEQ's two proposals and the existing narrative standard rule that's on the books; and 3) the Board proceed to schedule public hearings in Miles City, Montana, and Helena on the 17th and the 19th of September, with the intent of having the facts gathered for the necessary rulemaking on December 6, 2002, with the recognition that it may be necessary to extend some of these dates in order to reach a final decision.

Mr. Searle referenced 75.5.201 (Code of Federal Regulations) and the Montana Constitution, suggesting the Board was allowed to adopt rules of this nature. Mr. Bowe rebutted Mr. Searle's testimony suggesting that portions of the proposed rule relate more to the management of DEQ rather than to the beneficial uses of water.

Chairman Russell led discussion on the NPRC petition. It was concluded that the petition could be reformatted and the appropriate changes made and the petition submitted to the Secretary of State to meet the publishing date deadline.

Mr. Shanahan made an AMENDED MOTION to include NPRC's petition as an alternative. It was determined that a fourth alternative would actually be to do nothing and therefore the existing narrative standards would remain in place.

Discussion was held regarding rule filing deadlines and timelines for Board decisions on rulemaking.

Mr. Shanahan turned his original motion around and MOVED to: 1) start the rulemaking process by publication of notice with a request for public comment on all three alternatives presented this day, and that the Board proceed to schedule public hearings in Miles City, Montana, and Helena, Montana, on the 17th or 19th, whatever date is appropriate, with the intention of having the facts gathered for a rulemaking final decision at the December 6, 2002, meeting of the Board, but recognizing the possibility that it may be necessary to extend the time for this final decision; and 2) have the Montana DEQ, the Wyoming DEQ, the gas producers, and the affected parties proceed to resolve their differences within the next 90 days and report to the Board their proposed solutions and remaining differences by October 28, 2002. Ms. Brooke SECONDED the motion. Further discussion commenced regarding the need for all parties involved to work together to try to resolve their differences. A VOTE was taken and the motion CARRIED unanimously.

Discussion was held concerning whether the Board would hold the hearings or assign a hearings officer. Mr. Hudson MOVED that the Board conduct the hearings in Miles City and Helena. Ms. Lacey SECONDED the motion. Further discussion commenced concerning the dates of for the public hearings. A VOTE was taken and the motion CARRIED unanimously.

B. Adoption, Modification, or Appeal of Final Rules

1. In the matter of the adoption of new Rules I through X pertaining to water use classifications and numeric nutrient standards; and the amendment of ARM 17.30.602 and 17.30.619 pertaining to definitions and incorporations by reference.

Mr. Bowe advised the Board that he was the presiding officer at the public hearing and that there was a lot of public comment. He stated that the DEQ recommends adoption of the rules with some of the changes that were recommended during the comment period. Discussion commenced concerning this rulemaking and water classification issues. Ms. Lacey MOVED to ADOPT the rule as presented with the modifications that were noticed, and also ADOPT the 521 and 311 analysis as presented by DEQ. Ms. Brooke SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

2. In the matter of the adoption of new Rule I pertaining to maintenance of air pollution control equipment for existing aluminum plants.

Mr. Bowe was the presiding officer in this matter and stated that DEQ's recommendation is to question whether the rule was really needed. If the Board determines it is needed, the rule would accomplish the goal without going through the variance process.

Mr. Steve Wright, Columbia Falls Aluminum Company (CFAC), spoke in favor of having the rule. Brief discussion took place concerning CFAC's pollution control equipment. Mr. Hudson MOVED to PROCEED with the rule. Mr. Shanahan SECONDED the motion. Chairman Russell made a note that the motion was to include the hearing examiner's report and the findings and DEQ's 521 and 311 analysis. A VOTE was taken and the motion CARRIED unanimously.

3. In the matter of the amendment of ARM 17.8.1201 pertaining to the definition of major source in the air quality operating permit rules.

Mr. Bowe was the presiding officer and informed the Board that there were no public comments, written or otherwise. He advised that this was a very routine rulemaking and that DEQ recommends adopting the amendment.

Mr. Shanahan MOVED to ADOPT the rule with the hearing officer's report. Mr. Hudson SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

D. New Contested Cases

1. In the matter of M & W Investments, Inc.'s appeal of DEQ's denial of the request for revision of a previous subdivision approval (EQ #02-2146).

Mr. Bowe advised the Board that he had set this matter for hearing on November 13, and suggested the Board appoint him as the permanent hearing examiner.

Mr. Hudson MOVED to APPOINT Mr. Bowe as the permanent hearing examiner for this matter. Ms. Lacey SECONDED the motion. A vote was taken and the motion CARRIED unanimously.

2. In the matter of Van Dyke Construction Company, Inc. and Loughmiller Reclamation, L.L.C.'s (BER 2002-07 OC) appeal of a DEQ proposed penalty under the Opencut Mining Act.

Mr. Bowe informed the Board that a proposed schedule had been submitted by the parties and included a hearing date in December. He suggested the Board appoint him as the permanent hearing examiner for this case.

Mr. Hudson MOVED to APPOINT Mr. Bowe as the permanent hearing examiner for this case. Mr. Shanahan SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

3. In the matter of Big Bend Ranch Development Company's (BER 2002-08 SUB) appeal of DEQ's denial of a subdivision approval (EQ #02-2273).

Mr. Bowe explained he had received a proposed schedule from the parties that a hearing be held in November. Mr. Bowe suggested that if the Board were to appoint him as hearing examiner he would issue a scheduling order substantially following the one submitted by the parties.

Ms. Lacey MOVED to APPOINT Mr. Bowe as the permanent hearing examiner for this case. Mr. Fishbaugh SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

4. In the matter of C.R. Kendall's (BER 2002-09 MM) appeal of DEQ's decision to deny a minor permit amendment, under the Metal Mine Reclamation Act.

Mr. Bowe informed the Board that he had issued the first prehearing order on July 16 and had asked the parties to provide him with a proposed schedule of proceedings by July 31. He suggested the Board appoint him as the permanent hearing examiner in the case.

Mr. Shanahan MOVED to APPOINT Mr. Bowe as the permanent hearing examiner in the case. Mr. Fishbaugh SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

E. Proposed Addition to the Board Web Site: Frequently Asked Questions (FAQs)

Mr. Bowe provided background on this agenda item, stating that it was a proposal Board Member Shanahan had made to provide guidance on air quality permit appeals. Mr. Bowe had prepared a FAQs draft. Mr. Bowe informed the Board that he had received some comments and had revised the FAQs. He proposed that they be put on the website.

Mr. Bowe explained that there were two parts to the FAQs, one concerning appealing decisions in general and one relating specifically to certain air quality permits. He stated he had received extensive comments from Mr. Chuck Hansberry, which were included in the Board packets, and that he had incorporated many of the suggestions made.

Mr. Hansberry commended Mr. Bowe for his work on the FAQs, but advised that there were three more things he would like to have seen addressed. He stated that some introductory language should be added explaining that they are only guidelines but that, aside from specific situations, parties should expect to follow them. Another change he felt should be addressed concerned parties who file appeals but do not participate in the appeal process. The third change he requested related to expert disclosure. He stated that with those three changes they would support the remaining FAQs.

Mr. Bowe addressed Mr. Hansberry's requests, stating the purpose of putting FAQs on the Web was to provide guidance to the public, not to engage rulemaking.

Chairman Russell asked for clarification on the expert witness disclosure issue, of which Mr. Bowe provided.

Mr. Shanahan engaged discussion pertaining to the inclusion of a preamble that would speak to how the Board feels the guidelines might be used.

Mr. Shanahan MOVED to POST the FAQs on the Web with the preamble language. Mr. Hudson SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

2. Hearings

a. The Board held a hearing for the purpose of reviewing the temporary water quality (TWQ) standards that it issued in 1999 to the New World Mining District.

Chairman Russell provided background information regarding the subject of this hearing. He stated that the public hearing was being conducted under Montana Code Annotated (MCA) Section 75.5.312(10) and recited it to include "...The Board may terminate or modify the temporary standards based on information submitted at the time we review."

Mr. John Koerth testified on behalf of DEQ, stating he had been the project coordinator working with the Forest Service on this project since its inception. He advised the Board that DEQ was recommending that ARM 17.30.630(1) continue in effect as adopted. Mr. Koerth provided a summary of the activity that had taken place during the previous three years.

Mr. Koerth informed the Board that DEQ had reviewed the progress report prepared by the Forest Service and that DEQ concluded there had been some apparent slight improvements in water quality documented, but that those apparent slight improvements could not be attributed to any of the actions the Forest Service had done over the last three years. He further stated that there was no biological significance to those improvements. Mr. Koerth reminded the Board that the goal of the temporary standards was to allow the streams to eventually attain the beneficial uses associated with the D-1 standard.

Mr. Koerth reiterated that DEQ's recommendation was that the standards continue in effect while the Forest Service continues their work. On behalf of DEQ, he further recommended that the Forest Service submit a revised implementation plan to update their schedule for however many more years they'd be working and to also address any mine waste sources that they identified in their inventory that were not known about when they had proposed their implementation plan.

Mr. Koerth also advised the Board of another area DEQ would like to see them clarify in the revised implementation plan concerning undisclosed areas that the Forest Service has indicated that they would not be performing work.

Ms. Mary Beth Marks, representing the USDA Forest Service, informed the Board that she was the on-scene coordinator for the New World Mining District Restoration Project. Ms. Marks submitted copies of their 2002-2003 Work Plan, along with a copy of her statement, to the Board. She informed the Board that the Forest Service was aggressively pursuing the cleanup of the New World Mining District and provided various facts and figures on their progress throughout the previous three years.

Ms. Marks provided information relating to their current activities and gave details of their future plans. She stated that as future work proceeds, they expect the magnitude and aerial significance of the improvements to water quality to become progressively more obvious. On behalf of the Forest Service, she recommended the Board not adjust the temporary standards at this time, as they are a necessary and important tool in allowing their cleanup of historic mine waste in the New World Mining District to proceed.

On behalf of the Bear Tooth Alliance, Mr. Mike Whittington stated that they believe satisfactory progress toward water quality restoration had been made. Their recommendation was that there be no change to the TWQ Standards the Board adopted in 1999 and further recommended they be extended.

Chairman Russell concluded the hearing. Mr. Hudson MOVED that the Board take no action. Mr. Fishbaugh SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously.

Mr. Hudson MOVED to ADJOURN. Mr. Shanahan SECONDED the motion. A VOTE was taken and the motion CARRIED unanimously. The meeting adjourned at 4:40 p.m.

Board of Environmental Review July 26, 2002, Minutes Approved:

JAN P. SENSIBAUGH
DIRECTOR
DEPARTMENT OF ENVIRONMENTAL
QUALITY

JOSEPH W. RUSSELL, M.P.H.
CHAIRMAN
BOARD OF ENVIRONMENTAL
REVIEW

DATE

DATE